

YENG HING ENTERPRISE SDN. BHD.

a

v.

DATUK DR. ONG POH KAH

SUPREME COURT, KOTA KINABALU

LEE HUN HOE CJ (BORNEO)

GEORGE SEAH SCJ

b

MOHD. AZMI SCJ

[CIVIL APPEAL NO. 522 OF 1986]

27 FEBRUARY 1988

CIVIL PROCEDURE: Summary Judgment - Order 14 RHC - Appellant company sued respondent, a director of appellant Company - Claim for money misapplied by respondent wrongfully and without lawful authority and placing it in his own personal name - Whether breach of duty as trustee - Judge granted unconditional leave to defend action - Claim is also for compound interest - Whether interest upon interest is permissible - Cross-appeal by respondent against ruling that respondent not entitled to relief under s. 354 of Companies Act 1965 - Whether respondent entitled to relief under said s. 354.

c

This was an appeal by the appellants against an order of the learned Judge granting the respondent unconditional leave to defend the action following an application for summary judgment under O. 14 of the RHC 1980. The respondent has cross-appealed against that part of the ruling in which the learned Judge had held that the respondent was not entitled to relief under said s. 354 of the Companies Act 1965.

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Held:

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[1] There was considerable suspicion as to the *bona fide* of the defence of the respondent to the appellant's claim of RM210,746.50 and the respondent was granted leave to defend the claim of RM210,746.50 conditional upon him paying into Court the said sum within 30 days from date of this order, failing which the appellants shall sign judgment for that amount.

[2] As to the sum of RM189,472.73 which represented compound interest claimed by the appellants up to 27 April 1984 it was common ground that there was no express or implied agreement as to its payment by the respondent. Having regard to the provisions of s. 11 of the Civil Law Act 1956 and in particular proviso (a) which forbids the giving of interest upon interest, the Supreme Court agreed with the learned Judge that the respondent be given unconditional leave to defend this particular claim.

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[3] As to the cross-appeal by the respondents, the ruling of the learned Judge is set aside as the question under s. 354 of the Companies Act 1965 should not be determined summarily as it is a question of fact as to what 'honestly and reasonably' means.

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[4] Both the appeal and the cross-appeal were allowed and each party was ordered to pay its own costs.

[Appeal and cross-appeal allowed. Each party to pay its own costs. Deposit to be refunded to appellants.]

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Legislation referred to:

Civil Law Act 1956, s. 11(a)

Companies Act 1965, s. 354

Rules of the High Court 1980, O. 14, O. 88 r. 5(j)

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For the appellants - Anne Wong; M/s. Skinner Lind Robertson Willie Wong & Chin

For the respondent - Chan Wing Kong; M/s. William Liaw Chan & Co.

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JUDGMENT

George Seah SCJ:

b This is an appeal by the plaintiffs against an order of the learned Judge granting the defendant unconditional leave to defend the action following an application for summary judgment under O. 14 of the Rules of the High Court 1980. There is a cross-appeal by the defendant against that part of the ruling in which the learned Judge held that the defendant was not entitled to relief under s. 354 of the Companies Act 1965.

The brief facts leading to this action are as follows.

c The plaintiffs are a company incorporated in Malaysia with registered office at Yeng Ho Hong Industrial Building, 2nd Floor, 1½ Mile, Leila Road, Sandakan, Sabah. The defendant was and still is a director of the plaintiff company. A total sum of RM3,233,485.97 of the plaintiffs' money was deposited with the Malayan Banking Bhd., Sandakan. It was alleged that between December 1980 and July 1981, the defendant, in breach of his duties as trustee, wrongfully and without lawful authority, misapplied the said RM3,233,485.97 by transferring the same to Hong Kong and placing it in his own personal name. Upon discovery of this the Board of Directors of the plaintiff company demanded the return of the money from the defendant.

d The defendant thereupon refunded the total sum of RM3,022,739.47 leaving a balance of RM210,746.50. It seems that the difference of RM210,746.50 represents the fluctuation of the exchange rate when the money was remitted back to Sandakan. In addition to RM210,746.50 the plaintiffs are also claiming from the defendant compound interest amounting to RM189,472.73 as at 27 April 1984, making a sum of RM400,219.23.

e In his statement of defence the defendant admitted that he remitted RM3,183,485.97 to Hong Kong and the total interest earned was HK\$176,543.58. He however, transferred RM50,000 to the plaintiffs' account at Chung Khiaw Bank, Sandakan, Sabah, to meet general expenses of the plaintiff company. The defendant alleged that due to a change in the investment climate he transferred (a) S\$1,000,000 to a bank in Singapore, (b) another RM1,000,000 to a bank in Kuala Lumpur, Malaysia and (c) another RM876,239.47 to Chung Khiaw Bank, Sandakan, Sabah.

f He denied that he had committed any breach of his duties as a director or trustee of the plaintiff company and further denied he had wrongfully misappropriated any part of the money. The defendant averred that he had acted throughout *bona fide*, honestly and reasonably and if he had been guilty of any negligence, default, breach of duty or trust he submitted that he ought to be relieved from his liability by the Court under s. 354 of the Companies Act 1965. Lastly, the defendant alleged that in diverting the plaintiff company's funds for business investment purposes in Hong Kong he acted on the view of some of the

g members of the Board of Directors of the plaintiff company.

h At the hearing of the O. 14 application learned Counsel for the defendant appeared to concede that no resolution authorising the diversion of the plaintiff company's funds to Hong Kong had been passed by the Board of Directors. Nor was there any minute recorded dealing with this matter. However, the truth of the matter was that when the plaintiffs demanded the return of the money from the defendant he apparently did so without demur. This seems to raise the *bona fide* of the defence to the plaintiffs' claim to the sum of RM210,746.50 which the learned Judge did not appear to consider. If the learned Judge had directed his mind to this particular defence it is doubtful whether he would grant unconditional leave to defend. On our part we have considerable suspicion as to its *bona fide* and would give the defendant leave to defend the claim of RM210,746.50 conditional upon him paying into Court the said

i sum within thirty days from date of this Order, failing which the plaintiffs shall sign judgment for that amount.

With regard to the RM189,472.73 which represented compound interest claimed by the plaintiffs up to 27 April 1984 it was common ground that there was no express or implied agreement as to its payment by the defendant. Having regard to the provisions of s. 11 of the Civil Law Act 1956 and in particular proviso (a) which forbids the giving of interest upon interest, we agree with the learned Judge that the defendant be given unconditional leave to defend this particular claim.

We come now to the cross-appeal of the defendant.

It was submitted by learned Counsel that the learned Judge erred in ruling that the defendant was not entitled to relief under s. 354 of the Companies Act 1965 without hearing the witnesses which the defendant intended to call at the trial. For the plaintiffs it was argued that if the defendant was to rely on s. 354 he should make his application by way of petition [see O. 88 r. 5(j) of the Rules of the High Court 1980]. Order 88 r. 5(j) is in *pari materia* with the corresponding O. 102 r. 5(k) of the English counterpart. Dealing with sub-para. (k) the learned authors of *The Supreme Court Practice* 1982 state:

It is apprehended that no petition can be presented under the sub-section after proceedings have been commenced against the person seeking relief in respect of any liability to which the action relates; relief must be applied for in the action under sub-section (1). Where proceedings are taken under sub-sections (1) in a Court of summary jurisdiction, that Court only has jurisdiction to grant relief in respect of those proceedings (*Re Gilt Edge Safety Glass Ltd.* [1940] Ch. 495).

In other words, if action had been taken against the defendant in a Court of law, he might plead s. 354 of the Companies Act 1965 as part of his defence. There was no need for the defendant to bring a separate suit claiming relief under s. 354 of the Act, and thus incurring unnecessary costs. We therefore reject the submission of learned Counsel for the plaintiffs, and set aside this part of the ruling. In our opinion, question under s. 354 of the Companies Act 1965 should not be determined summarily as it is a question of fact as to what ‘honestly and reasonably’ means.

For the above reasons we would allow both the appeal and the cross-appeal on the terms set out above. We order that each party to pay its own costs. The deposit to be refunded to the plaintiffs.

Also found at [1988] 1 CLJ 291

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